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Supreme Court of the United States

OCTOBER TERM, 1968

No. 314

CLIFFORD H. RAY, Petitioner,

v.

SEABOARD AIR LINE RAILROAD COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT

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Petitioner, Clifford H. Ray, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, First District, affirming the summary final judgment entered for respondent by the Circuit Court for the Eighth Judicial Circuit of Florida under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51, et seq.

OPINIONS BELOW

The opinion of the First District Court of Appeal is reported at 205 So. 2d 537 and is set out in Appendix A. The

order of the Supreme Court of Florida of May 3, 1968, denying certiorari, with one justice dissenting, is unreported and is set out in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Did the Florida appellate court err in holding that in an action under the F.E.L.A. an injured railroad employee was not entitled to go to the jury as a matter of law, where the record showed:

Plaintiff, an inspection foreman, while riding an inspection motorcar in the course of his employment was seriously injured when the motorcar struck a dog and derailed, throwing the plaintiff onto the tracks; the plaintiff, in his deposition, testified that he could not reach the back handrail because it was too far back; that he received bruises on both hands; the affidavits relied upon by the defendant in its motion for summary judgment were those of an employee of the defendant and an employee of the manufacturer of the motorcar in question; one of such affidavits never gave an opinion as to the safeness of the motorcar, and the other stated a conclusionary opinion that the motorcar ". . . is designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices are installed . . .", but the affidavit failed to mention the lack of side handrails and a seat belt for the operator, and neither of such affidavits explained how or why the operator was thrown from the car?

STATUTE INVOLVED

The pertinent Section of the F.E.L.A., 45 U.S.C. Sec. 51, is set out in Appendix C.

STATEMENT

The plaintiff sued the defendant under the F.E.L.A. alleging that defendant negligently furnished plaintiff a dangerous and unsafe place on which to work and failed to provide plaintiff with a reasonably safe place to work and sufficient and proper equipment including handrails and other safety devices.

On May 3, 1962, plaintiff was employed by the railroad as a section foreman, and as part of his normal duties, was riding a motorcar over the railroad tracks inspecting the tracks. (R. 27-29) The motorcar was traveling in a southerly direction and plaintiff was seated on the left rear side facing south. (R. 31-32) Plaintiff was primarily engaged with the operation of the car, and two other employees who were riding on the front of the car were engaged in inspecting the tracks. (R. 32) The controls on the car are located in the center which is merely a bed across the top. (R. 31) Plaintiff was seated in the seat provided for the operator, which was a small board extending out from the top of the box. (R. 31) The only handrails on the car were one in the front which extended the entire width of the car, about 56 inches, and a small one in the back which extended only a portion of the width of the car, or about 20 inches. (R. 30-31)

Just after the car passed over a road crossing and while plaintiff was operating the control levers, he felt the car shudder. At that time the car struck a dog, immediately raised up on the high or west side of the track, causing the

car to jump out from under the plaintiff, dropping him on the lower or east rail of the track. (R. 34-36). The car continued to roll on off the track, and the two men who were riding on the front of it where the handrail extended the entire width of the car were not thrown off. (R. 40-63)

At the time plaintiff felt the impact, he was using both hands in operating the controls. With regard to his being able to hold onto a hand rail, the record shows the following:

> "Q. At the time that you felt the shuddering, could you describe for me what you were holding on to?
>
> A. Had my hand on the brake--had bruises all over on my hand there.
>
> Q. You have indicated that you had your right hand on the brake, so what was your left hand on--did you have hold of the back rail that's provided?
>
> A. *Can't reach back there, in other words, too far back.*
>
> Q. And as you sat in the seat you were facing south?
>
> A. Yes.
>
> Q. Do you recall where your left hand was?
>
> A. There was a bruise on my wrist, I evidently must have been reaching for the throttle with it, because it was--or taking it out of gear, one, because you have to use both of the, you work both of them." (R. 37) (Emphasis supplied).

L. E. Conner, in his affidavit which was attached to the railroad's Motion for Summary Judgment, states that he has been employed by Seaboard for more than 20 years and is

Supervisor for Work Equipment for the company. He recommends to the management the type and design of all motorcars which are purchased. (R. 11) He has examined the photographs which were attached to plaintiff's deposition and identifies the car as being purchased from the manufacturer, Fairmont Railway Motors, Inc. He gives the history of the particular car subsequent to its purchase by Seaboard, and further, says that Seaboard has used numerous such motorcars. (R. 12-13) He knows of five concerns which manufacture motorcars and Fairmont is the largest manufacturer of such cars in the nation. He concludes with his opinion that the Fairmont motorcars are the best designed and the most efficient motorcars produced in the country. (R. 13-14) He never states that the cars are safely designed or have sufficient safety devices on them.

Neil J. McDonald, in his affidavit, states that he is Chief Engineer of Fairmont Railway Motors, Inc., and has been employed by Fairmont for a number of years in various capacities. He belongs to numerous societies and has delivered papers in the general area of his profession. (R. 15-16) From the pictures attached to plaintiff's deposition he identified the car as one being manufactured by Fairmont and sold to Seaboard. (R. 17)

Affiant personally participated in the engineering studies leading to the design and manufacture of the car, and it was designed in accordance with and in conformity to the well-accepted tried and tested sound engineering design principles; in accordance with accepted and standard safety principles; and in accordance with requirements of the various railroads who use the cars. (R. 17)

Fairmont also manufactures gang cars which are larger than the inspection cars, and these gang cars have safety

rails fore and aft which extend the entire width of the car, whereas on the inspection car the rear safety rail only extends for the width of the seat box or housing seat, rather than the entire width of the car. (R. 18)

Both fore and aft safety rails on the model car in question are designed and placed upon the car for the purpose of giving passengers and the operator a rail to hold on to for safety purposes. The rear rail gives the operator something to lean against and something to hold on to in the event that he should need to. It is so designed and located that he can reach behind him with his left arm and hook the left arm around the safety rail and at the same time operate the motor car with his right arm and hand. In those cases when he is using both hands in the operation, he has the control levers to hold on to and prevent his falling off. (R. 18)

Mr. McDonald states his conclusionary opinion that the car is designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices are installed on the said motor car; and that the rearmost safety rail on the car is reasonably adequate from a safety engineering standpoint to provide a handhold or safety rail for the operator to hold on to in order to prevent himself from being thrown from the car. (R. 19)

Neither the Conner nor McDonald affidavit explains why the rear safety rail does not extend the full width of the car as in gang cars, nor is there any mention of why there are no side safety rails. Neither affidavit negates the necessity of having a seat belt for the safety of the operator, and there is no mention of seat belts or similar safety devices at all.

On the foregoing evidence, the First District Court of Appeal affirmed a summary final judgment for the railroad,

entered prior to trial, in a per curiam opinion. The Supreme Court of Florida denied certiorari with one justice dissenting.

FEDERAL QUESTION RAISED

The complaint and demand for jury trial, (R. 1-4); and opinion on appeal (R. 71), citing an F.E.L.A. case, all show petitioner's repeated and continuous assertion of his rights under the F.E.L.A.

REASONS FOR GRANTING WRIT

Petitioner urges this Court to grant this petition for a writ of certiorari to the District Court of Appeal of Florida, First District, for the following reasons:

1. The decision below is in conflict with this Court's decisions in *Rogers vs. Missouri Pacific R. Co.*, 352 U.S. 500; *Wilkerson vs. McCarthy* 336 U.S. 52; *Shulz vs. Pennsylvania R. Co.*, 350 U.S. 523; and numerous other decisions of this Court holding that in F.E.L.A. cases "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought".

The present record upon which the Florida courts held as a matter of law that employer negligence played no part in producing the injury to petitioner consists of the deposition of petitioner to which are attached four photographs of the motorcar, and the two opinion affidavits submitted by the defendant. The opinion testimony contained in both affidavits is obviously biased. Even granting this, however, the Conner affidavit contains no opinion that the motorcar was

safe, or had sufficient safety devices on it to prevent the operator from falling off, or that the railroad had exercised reasonable care in furnishing a safe place on which to work.

In his affidavit Mr. McDonald says that the car was designed in accordance with well-accepted and tested safety principles, and although he goes into more elaboration on the physical equipment found on the car and the uses thereof, he ends his opinion with the net conclusion that all reasonable safety devices are installed on the car. Neither he nor Mr. Conner attempt to explain or even mention the absence of side safety rails, the absence of seat belts and other similar safety measures, or why the back handrail on the inspection car extends only a portion of the width of the car, whereas the front rail extends the whole width, and on gang cars both rails extend the whole width.

In direct conflict with McDonald's statement that the rear safety rail is suitably placed for the operator to hold on to in case of being thrown off, plaintiff, when asked if he had hold of the back rail at the time of the impact, stated that he could not reach back there because it was too far back. He further stated that he had bruises on both of his hands after the accident occurred.

On the basis of biased and inconclusive opinion testimony and in the face of directly conflicting statements by plaintiff, the Florida courts have held as a matter of law that the railroad was not negligent and that the employee should be deprived of his right to jury trial.

As far back as 1897 in considering the conclusive nature of expert testimony, this court said ". . . the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which

requires them to surrender their judgment, or to give a controlling influence to the opinion of scientific witnesses . . ." *The Conqueror* 166 U.S. 110 at 133.

As *Wilkerson vs. McCarthy* held at 336 U.S. 57:

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Had this case been submitted to a jury, the jury could certainly have inferred from plaintiff's statements concerning his inability to reach the back hand rail and the fact of his having bruises on both hands that there were not sufficient safety devices on the car. And in accepting plaintiff's testimony and inferences therefrom, the jury likewise could have disregarded the wholly conclusionary opinions of obviously biased witnesses.

2. The Florida courts have decided important questions regarding the concept of negligence under the F.E.L.A., contrary to the decisions of this Court. Since the only basis for the court's holding was the opinion testimony contained in the affidavits, the Florida court has determined that one man's biased opinion that the car "is designed and constructed upon sound and accepted engineering principles; that all reasonable safety devices are installed on said motorcar . . ." is sufficient to completely negate negligence on the part of the railroad. The refusal to allow a jury to find negligence "because everything was done upon sound and accepted engineering principles" is in direct conflict with the federal law. E.g., *Texas & P. R. Co. vs Behymer*, 189 U.S. 468; *Terminal R.*

Ass'n of St. Louis vs. Schorb (C.A. 8, 1945), 151 F. 2d 361, cert. den. 326 U.S. 786. As these cases hold, the jury and not the railroad sets the standard of care.

3. The decision below, if permitted to stand, will materially frustrate the Congressional intent to afford injured railroad employees rights under the F.E.L.A. The Florida opinion prevents injured employees from going to a jury and proving negligence by proving that the railroads could, with relative simplicity, have provided them with safer working conditions. In the instant case such working conditions would consist of safety devices such as side rails, a back handrail which extended the entire width of the car, and a seat belt with which to hold the operator in place so that he would not fall off the side of the car if it became derailed.

In this modern day and age of scientific endeavor, the public at large has finally realized that seat belts, if not shoulder straps, should be mandatory in automobiles. Congress has seen fit to legislate to this effect. See *National Traffic and Motor Vehicle Safety Act of 1966*, Public Law 89-563; Title 23, U.S.C. Chapter 2, and Motor Vehicle Safety Standard No. 208 thereunder, which requires that seat belts be installed in each passenger car seat position. In spite of all the public awareness and discussion upon the excellent safety features of seat belts in automobiles, the Florida courts have held as a matter of law that the absence of seat belts for the operator of a motor inspection car constitutes no evidence of negligence on the part of the railroad. It is respectfully submitted that the Florida courts are backward in taking this position in refusing to allow a jury to determine if negligence is created, and this Court has, on other occasions, reversed the Florida courts for similar faulty reasoning. E.g., *Strickland vs. Seaboard Air Line Railroad Co.*, 350 U.S. 893; *Conner vs. Butler*, 361 U.S. 29.

An illustrative F.E.L.A. case concerning negligence and proximate cause for failure to equip motor vehicles with seat belts is *Mortensen vs. Southern Pacific Co.*, 245 C.A. 2d 241; 53 Cal. Rptr. 851, 1966. Plaintiff's testate, while driving a pickup truck owned by the defendant railroad in the course of his employment, was rear-ended by a car whose driver was intoxicated. The truck rolled over several times and the decedent was thrown from the car, sustaining injuries which resulted in his death. The truck was not equipped with seat belts and at the trial there was various testimony as to the use of seat belts and the chance of survival of a person so protected by one. At the close of the plaintiff's case the defendant's motion for nonsuit was granted. The California appellate court quoted from several U.S. Supreme Court F.E.L.A. cases, saying that Federal decisional law governs in determining whether the evidence requires submission to the jury. The court correctly stated that under the Federal authority, the evidence and inferences which might reasonably be drawn therefrom presented a jury question as to the railroad's negligence in failing to provide seat belts.

4. The decision below is clearly wrong and denies an injured railroad employee his right to trial by jury to which he is clearly entitled under federal law.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Certiorari has been furnished to John S. Cox, 630 American Heritage Life Building, Jacksonville, Florida, 32202, Attorney for the Respondent SEABOARD AIR LINE RAILROAD by U. S. Mail this 18th day of July, A. D. 1968.

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James F. Lang

Attorney for Petitioner